

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JEROME M. CAPP	:	ORDER
	:	DTA# 806529
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Personal Income Taxes under Article 22 of the	:	
Tax Law and the New York City Administrative	:	
Code for the Year 1983.	:	

A Default Order having been mailed to petitioner on May 9, 1991; and

Petitioner having made a request by written application that the default determination be vacated; and The following facts having been established by the pleadings and other information submitted:

On September 29, 1989, the calendar clerk of the Division of Tax Appeals sent a letter to petitioner, Jerome M. Capp, at 202-02 43rd Avenue, Bayside, New York 11361, advising him that the Division of Tax Appeals anticipated scheduling a hearing on his petition during either the week of February 5, 1990 or March 19, 1990. On October 23, 1989, petitioner returned this letter indicating he preferred that the hearing be scheduled on a Friday and that the week of February 5, 1990 was inconvenient.

On February 12, 1990, a Notice of Hearing, signed by Dennis M. Galliher, Administrative Law Judge, was sent to petitioner, at his Bayside address, advising him that a hearing was scheduled for Friday, March 23, 1990 at 10:30 A.M. in New York City.

On March 23, 1990 at 11:15 A.M., Brian L. Friedman, Administrative Law Judge, called the instant matter for hearing. Petitioner did not appear and had not previously contacted Judge Friedman or any employee of the Division of Tax Appeals with an explanation. Lawrence Newman, Esq., the representative for the Division of Taxation, appeared at the hearing and stated that he also had not had any communications with petitioner. Mr. Newman

made a motion for a default order to be issued against petitioner.

On March 28, 1990, Judge Galliher received a letter from petitioner, stating that he did not appear at the hearing on March 23, 1990 because he had oral surgery on March 22, and due to complications the surgery had to be completed on March 23, the date of the hearing. Enclosed with the letter were a statement from petitioner's doctor and copies of his prescription, all dated March 22, 1990.

On June 11, 1990, the Division of Tax Appeals received a second letter from petitioner, which elaborated upon his reason for not appearing at the hearing. Copies of the first letter and its contents were enclosed with the second letter.

On June 26, 1990, Daniel J. Ranalli, Assistant Chief Administrative Law Judge, sent a letter to petitioner explaining that due to the oral surgery a default order would not be issued and that the hearing would be rescheduled for Monday, September 10, 1990 at 1:15 P.M. in New York City.

On July 30, 1990, Judge Ranalli received a letter from petitioner requesting that his hearing be rescheduled from Monday, September 10, 1990 to either Wednesday, Thursday, or Friday, September 12-14, 1990 because of a personal conflict. Judge Ranalli forwarded this letter to Robert F. Mulligan, Administrative Law Judge, since the hearing calendar had already been prepared and Judge Mulligan assigned to the case.

On August 6, 1990, a Final Notice of Hearing, signed by Judge Mulligan, was sent to petitioner, at his Bayside address, advising him that a hearing was scheduled for Monday, September 10, 1990 at 1:15 P.M. in New York City.

On August 8, 1990, Judge Mulligan sent a letter to petitioner stating that he could not assign a new hearing date at that time, but that petitioner should keep himself available for a hearing on September 12-14, 1990. A new date for hearing of September 13, 1990 came available and the case was rescheduled.

On September 13, 1990 at 3:20 P.M., Frank W. Barrie, Administrative Law Judge, called the instant matter for hearing. Petitioner did not appear and had not previously contacted

the Division of Tax Appeals. Mr. Newman appeared and made a motion for a default order to be issued against petitioner.

On November 23, 1990, the default determination was issued to petitioner.

On December 24, 1990, the Division of Tax Appeals received a request from petitioner to vacate the default order.

On January 25, 1991, the request to vacate the default order was granted and the matter was rescheduled for a hearing on Tuesday, March 19, 1991 at 1:15 P.M. The Order stated that petitioner had not been properly notified about the hearing rescheduled for September 13, 1990.

On February 11, 1991, a Final Notice of Hearing, signed by Arthur S. Bray, Administrative Law Judge, was sent to petitioner at his Bayside address, advising him that a hearing was scheduled for Tuesday, March 19, 1991 at 1:15 P.M. in New York City.

On March 19, 1991 at 2:15 P.M., Judge Mulligan called the instant matter for hearing. Petitioner did not appear and had not previously contacted Judge Mulligan or any employee of the Division of Tax Appeals with an explanation. Mr. Newman again appeared and made a motion for a default order to be issued against petitioner.

On May 9, 1991, the default determination was issued to petitioner.

On June 10, 1991, the Division of Tax Appeals received a request from petitioner to vacate the default order. In his request, petitioner maintained that "it was inappropriate to schedule another hearing for a later date" (referring to the March 19, 1991 hearing), when petitioner's absence at the September 13, 1990 hearing was not due to his fault. Petitioner presented no further information in support of his application; and

It appearing to the Chief Administrative Law Judge from a review of such information as was submitted that neither a reasonable excuse nor a meritorious case has been shown for the following reasons:

(1) 20 NYCRR 3000.10(b)(3) requires that an excuse be shown in order to have a default determination vacated. Petitioner has failed to present any evidence pertaining to his absence from the hearing scheduled on March 19, 1990. Petitioner makes no claim that he did not

receive notice of the hearing, which was issued to petitioner at his Bayside address on February 11, 1991. (See Finding of Fact "14".) Petitioner's only claim, that it was inappropriate to schedule another hearing for a later date because he was not at fault for his absence at the September 13, 1990 hearing, has no relevance in the review of the default determination for the March 19, 1991 hearing. Based on the instant record, no excuse whatsoever has been demonstrated.

(2) 20 NYCRR 3000.10(b)(3) also requires that a meritorious case be shown in order to have a default determination vacated. Since petitioner has failed to meet the requirement that an excuse be shown, it is unnecessary to determine whether a meritorious case has been shown. However, an allegation that no further proceedings should be scheduled because petitioner's second default was not his fault certainly does not meet the requirement of demonstrating a meritorious case; therefore,

It is ordered that the request to vacate the default order, be, and it is hereby, denied and the Default Determination issued May 9, 1991 is sustained.

DATED: Troy, New York
July 03, 1991

CHIEF ADMINISTRATIVE LAW JUDGE